IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-74

PIPEFITTERS LOCAL UNION No. 562, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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PIPEFITTERS LOCAL UNION NO. 562, *et al.*,

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—against—

UNITED STATES OF AMERICA,

Respondent.

Motion for Leave to File a Brief of American Civil Liberties Union, as *Amicus Curiae*

It is hereby respectfully moved pursuant to Rule 42 of the Rules of this Court that the American Civil Liberties Union be granted leave to file the accompanying brief *amicus curiae* in support of the petitioners.

A letter of consent from the Respondent has been filed with the Clerk. Petitioners have declined to consent to the filing of a brief *amicus curiae.*

The American Civil Liberties Union is a nation-wide non-partisan organization with approximately 160,000 members in the United States. It is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been particularly concerned with the values of the First Amend-

ment. It has adopted as formal policy the following statement:

> Expenditures by labor unions and corporations for political purposes, including the support of candidates and the expression of views on and support of legislative and social issues, are a proper exercise of the rights of free expression protected by the First Amendment. There should be no absolute prohibition against such expression, but reasonable limitations may properly be set by statute as to the total amount expended.
>
> The use of members' dues by labor unions for political purposes is thus permitted by the First Amendment. Although some union members may dissent from the choice expressed by the union majority in political campaigns, so long as those members are free to participate in the decision-making process within the union they are not deprived of their civil liberties. In addition, dissenting union members are free to express their contrary opinion outside the union in public debate. However, special union assessments for political purposes, separate from union dues receipts, should be made by vote of the union's membership, with the rights of any member opposing to be free of the assessment.

This case raises an important question concerning the right of labor unions and of union members to contribute financially to candidates in federal elections. It also involves the rights of free speech and association of union

members. It also involves a question of the application of the Due Process Clause to vaguely drawn statutes.

Respectfully submitted,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The interest of the *amicus curiae* is set forth in the proceeding motion.

Statement

The petitioner-union and the individual petitioners were convicted on September 19, 1968, by a jury in the United States District Court for the Eastern District of Missouri, of conspiring to violate 18 U.S.C. §610, which proscribes, *inter alia*, any contribution by a labor organization "in connection with any election at which Presidential and Vice Presidential electors of a Senator or Representative * * * are to be voted for * * *." Local 562 was fined $5,000, and union officers John L. Lawler and George

Seaton were each sentenced to one year's imprisonment and fined $1,000. A panel of the Court of Appeals for the Eighth Circuit affirmed, one judge dissenting. The case was reheard *en banc*, and the court again affirmed petitioners' convictions.

The action for which petitioners were convicted consisted essentially of establishing a separate fund to which members of the union, as well as non-members working under the jurisdiction of the union, contributed. Part of the fund was used to support candidates in federal elections.

ARGUMENT

I. Section 610 Does Not Apply To The Facts Of This Case.

This case involves the constitutionality of a provision of the Federal Corrupt Practices Act, 18 U.S.C. §610. Twice before the statute and its predecessor have been before the Court; on both occasions, however, the Court avoided passing upon its constitutionality. *United States* v. *U.A.W.*, 352 U.S. 567 (1957); *United States* v. *C.I.O.*, 335 U.S. 106 (1948). The constitutional issues can be avoided in this case too. The judgment below could be reversed on the ground that the statute was improperly construed to cover the activities of the defendants. See *Brief for Petitioners*, pp. 51-77; *Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae*. Indeed, the present *amicus curiae* agrees with the petitioners and the AFL-CIO that, on the record in this case, these convictions cannot be sustained under Section 610. Further, the trial judge's charge improperly construed the statute so that the jury

could bring back guilty verdicts even if they found that contributions to the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund [hereinafter the Fund] were strictly voluntary.

The theory of the government, and of the courts below, is that Section 610 "prohibit[s] labor unions from using regular union funds to make direct monetary contributions for political purposes to candidates in federal elections." *Brief of Respondent*, p. 24. Under this theory, of course, the crucial questions are whether the Fund is the alter ego of Local 562, and whether the Fund's money is in reality the Union's money. Hence, whether contributions to the Fund are in fact voluntary is not dispositive.

We agree with the petitioners that the record in this case demonstrates both that the Fund is not the alter ego of the Union and that the funds in question were not the funds of the Union. *Brief of Petitioners*, pp. 51-69. In addition, we do not agree with the government that by enacting Section 610 Congress prohibited "all contributions and expenditures made in the name of a union, without regard to the source of funds utilized . . ." *Brief for the AFL-CIO as Amicus Curiae*, p. 7. See generally, *ibid.*; see *United States* v. *C.I.O.*, *supra*; cf. *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961). The statute does not presume to bar all contributions or expenditures made in the name of the union. See *United States* v. *C.I.O.*, *supra*. Further, the legislative history of the Act reveals that union funds whose source is voluntary contributions are excluded from the Act. See 93 Cong. Rec. 6440 (Sen. Robert Taft).

II. Section 610 Violates The First Amendment And Is Overbroad.

Especially as construed and applied by the courts below, Section 610 violates the rights of free speech, press, petition and association guaranteed by the First Amendment. In the opinion of five different Justices of the Supreme Court, Section 610 is unconstitutional on these grounds. In *United States* v. *C.I.O.*, 335 U.S. 106 (1948), Justices Rutledge, Black, Douglas and Murphy took that position. In *United States* v. *U.A.W.*, 352 U.S. 567 (1957), Chief Justice Warren joined Justices Black and Douglas in reaffirming their earlier position. In addition, four members of the Supreme Court who participated in the majority opinion of the Court in 1948 indicated that unless the Section could be construed to avoid a conviction in those cases, their only alternative would be to hold it unconstitutional. *United States* v. *C.I.O., supra,* 335 U.S. at 121; and in *United States* v. *Rumely,* 345 U.S. 41, 47 (1952), the Court stated that it "strained words" to avoid the constitutional issue presented in the C.I.O. case.

Other than the decision of the courts below, the only decision clearly sustaining the constitutionality of Section 610 in its present form is *United States* v. *Painters Local Union No. 481,* 79 F. Supp. 516 (D. Conn. 1948). This decision was set aside on appeal on the ground that the political expenditures involved were not covered by law, and the court of appeals declined to pass on the constitutional issue. 172 F.2d 854, 856 (2d Cir. 1949), citing *United States* v. *C.I.O. supra.*

We submit that it is time for the Court to pass on the constitutionality of this statute, and that it should be declared void.

In *United States* v. *C.I.O.*, the government conceded that Section 610 is an abridgement of "rights guaranteed by the First Amendment." 335 U.S. at 127-8, quoting the district court opinion, 77 F. Supp. 355 at 356, 357, 359 (D.D.C. 1948). The government is quite correct; Section 610 is a flat prohibition. It unqualifiedly makes unlawful all union expenditures in federal elections. It does not purport merely to regulate. It is not a mere limitation on the level of expenditures. Nor is it directed only to an identifiable, given specific evil controllable by Congress. Rather, *all* union expenditures in federal elections are absolutely barred if they are used to bring the union's election position before the general public. Compare *United States* v. *C.I.O.*, 335 U.S. 106 (1948). Section 610 applies even where the union allows dissenting members to withhold contributions from the fund which supports the expression of union views. Cf. *Brief for Petitioners* at pp. 36-37; but see *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961).

Most political expenditures relate directly or indirectly to speech, publication or some form of communication addressed to those whose votes are sought. The distinction between prohibiting speech and prohibiting expenditure for speech is non-existent. It is for this reason that any law that prohibits the right to engage in these types of political activities immediately raises a question as to whether it abridges the rights of free speech, press and association under the Constitution.

Especially as it is applied in this case, Section 610 goes much too far. Union members have voluntarily pooled their financial resources in political association in an or-

ganization which is separate from the Union. But this right of political association is central to the First Amendment. See *Brief for Petitioners* at pp. 82-83; *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958).

A labor union operates in many ways—through collective bargaining, public education, litigation, legislation and public elections. In order to serve its members and their interests adequately, it needs to do all of these things. Support for particular legislation by testimony before legislative bodies, aid to sympathetic candidates and elected politicians, pressuring state and federal government bodies are all necessary if a union is to function effectively. The legislative and political functions cannot be divorced from the bargaining functions. That is precisely what Section 610 attempts to do. Cf. *United States* v. *Construction and General Laborers Union No. 264*, 101 F. Supp. 869 at 875.

Congress may not require unions to divorce themselves from political and legislative functions. They are at the heart of the First Amendment freedom of association; they are constitutionally protected. See e.g., *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *AFSCME* v. *Woodward*, 406 F.2d 137 (8th Cir. 1969); *Orr* v. *Thorpe*, 427 F.2d 1129 (5th Cir. 1970); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *National Association of Letter Carriers* v. *Blount*, 304 F. Supp. 546 (D.D.C. 1969) (Three judge), *appeal dismissed*, 400 U.S. 801 (1970). This Court has explicitly recognized the First Amendment protection of labor union activities to secure judicial enforcement of union members' rights even when these rights are not directly related to a union's function as a collective bargaining agent. *United Trans-*

portation Union v. *Michigan Bar*, 401 U.S. 576 (1971); *United Mine Workers* v. *Illinois Bar*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1 (1964). Surely a labor union's right to petition legislators receives the highest protection of the First Amendment. Cf. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961), where the Court refused to apply the Sherman Act against an Association of railroads seeking to advance their own commercial interests by high powered propaganda efforts designed to persuade Congress to enact legislation restraining the trade of competitive truck companies. See *International Association of Machinists* v. *Street*, *supra*, 367 U.S. at 812-14 (1961) (Frankfurter, J. dissenting). Further, in the *Street* case, the Court in effect legitimated labor union expenditures in support of candidates for public office. See *Street*, *supra*; *id.* 367 U.S. at 788-89, 796 (Black, J. dissenting).

Because Section 610 invades the protected province of free press, speech, petition, and association, it suffers fatal defects under the overbreadth doctrine, which has two components. A law is overbroad when it proscribes acts "which legitimately may be proscribed" as well as acts "which may not be proscribed." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 609 (1967); see also, e.g., *United States* v. *Robel*, 389 U.S. 258, 267-68 (1967); *Schneider* v. *Smith*, 390 U.S. 17, 24 (1968); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966): A law is also overbroad, in violation of the First Amendment, if some means less restrictive of the essential democratic interest in free communication and association is available for government to pursue its other subordinating or paramount interests. See, e.g., *United States* v.

Robel, supra; Shelton v. *Tucker*, 364 U.S. 479, 488; *Schneider* v. *Smith, supra; United States* v. *O'Brien*, 391 U.S. 367, 376-77.

Section 610 suffers from both defects of overbreadth. It is unconstitutional under the first aspect of the doctrine to the extent that it penalizes clearly protected activities. See, e.g., *United States* v. *C.I.O., supra* (semble); cf. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). Section 610 is unconstitutional under the second aspect of the overbreadth doctrine as well. The government cannot sustain its burden of demonstrating that no less restrictive means are available to accomplish its subordinating purpose.

In *United States* v. *C.I.O.*, the government contended, as to Section 610, that "Congress has power under Article I, Section 4, of the Constitution to abridge First Amendment rights if it considers such a course necessary in maintaining the purity and freedom of elections." 332 U.S. at 127-8, citing the district court opinion, 77 F. Supp. 355 at 356, 357, 359 (D.D.C. 1948). The government makes the same claim again in this case. *Brief for Respondent* at pp. 35-36. The government also contends that Congress may act to protect the rights of individual union members. *Brief for Respondent* at pp. 36-39.

It is by no means clear, however, that union contributions to candidates for federal office have any deleterious effect on "the purity and freedom of elections." Any conceivable bad effect is likely to be diminimus; for Union contributions have never amounted to much more than 5 per cent of the *total* contributions to both parties. This is not a proportion large enough to exercise a decisive influence in any direction. Bok and Dunlop, Labor and the American Com-

MUNITY at 414 (1970), citing HEARD, THE COSTS OF DEMOCRACY at 20 ff. (1962).

Considering Section 610's massive invasion of First Amendment rights, the government's interest just is not compelling. Further, the less restrictive alternative of comprehensive election reform, including the setting of maximum limits on expenditures, is clearly available to secure its legitimate interest.*

The government's claim that Section 610 protects the interests of dissenting union members is also unavailing. On the record in this case, the government has not demonstrated that the dissenting union member is compelled to contribute to the political Fund. See, e.g., *Brief for Petitioners* at pp. 29-36. This Court has ruled that the dissenting union member's interest is adequately protected if he can contract out the portion of his dues that would be expended in support of political positions with which he disagrees. *International Association of Machinists* v. *Street, supra.* In addition, the dissenting union member is fully protected in his right to express his contrary opinion inside the union and outside of it in public debate. See The Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §411; *Hurwitz* v. *Directors Guild of America, Inc.*, 362 F.2d 67 (2d Cir. 1966), *cert. denied*, 385 U.S. 971 (1966); cf. *International Association of Machinists* v. *Street, supra.*

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* See 382 Federal Election Campaign Act of 1971; 92d Cong., 1st Sess.; Conference Committee Report of §382, No. 92-58 (December 14, 1971).

III. Section 610 Is Unconstitutionally Vague.

Section 610, Title 18, U.S.C., on its face, and as construed and applied by the courts below, is so vague and uncertain as to violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

No principle of federal constitutional law, or of due process of law, is better established than the so-called vagueness doctrine. See generally, Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). Early and often this Court has declared that:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess of its meaning and differ as to its application, violates the first essential of due process of law. *Connally* v. *General Constructions Co.*, 269 U.S. 385, 391 (1926).

Penal laws especially must meet a heavy requirement of clarity. *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). Further, where a law may "abut upon sensitive areas of basic First Amendment freedoms," *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964), the requirement of clarity is heaviest of all. If the rule were otherwise, we would have cause to fear that "the free disseminatoin of ideas may be the loser," *Smith* v. *California*, 361 U.S. 147, 151 (1959); for uncertainty would cause people to "steer far wider of the unlawful zone, *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958) . . . , than if the boundaries of the forbidden are were clearly marked." *Baggett* v. *Bullitt*, *supra* at 372.

The doctrine of vagueness has several interrelated components or functions each of which expresses the constitu-

tional need for clarity at the various points along the criminal process. See generally, Note, *supra*, 109 U. Pa. L. Rev. 67 (1960); Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim. L. Bull. 205 (1967); Note, *Bringing the Vagueness Doctrine on Campus*, 80 Yale L.J. 1261 (1971).

First, a statute must be sufficiently clear that reasonable men seeking to conform their conduct to the requirements of law will be able to understand and agree as to what is prohibited and what is permitted. In this sense, vagueness effects a deprivation of notice. See, e.g., *United States* v. *Robel*, 389 U.S. 258, 281 (1967) (Brennan, J., concurring). That was the point of the *Connally* and *Lanzetta* decisions. The requirement of notice exists not merely to enable men to conform their conduct to law, but also to enable men charged with violations of law to prepare their defenses properly.

At this point the notice function of the vagueness doctrine merges into a second function. The crux of the problem becomes improper delegation. The Court has recognized that an over-vague criminal statute will tend to "license the jury to create its own standards in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). Accord *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *Giacco* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). In a sense, this dimension of vagueness stands as a chide to the legislature, because of its "failure to have made a 'legislative judgment' . . . ." *United States* v. *Robel*, *supra*, 389 U.S. at 275 (Brennan J., concurring). But it is much more than this. It is also responsive to the likelihood that, unless the legislature provides reasonably clear standards of illegality, judges and juries may have a tendency to enforce

laws not even-handedly but selectively and discriminatorily against only the unpopular and the downtrodden.

This due process need to constrain discretion extends not only to the actions of judge and jury, but also to the actions of the prosecutor. This is the third function of vagueness. The prosecutor too must be restrained because an overvague criminal law is "susceptible of sweeping and improper application." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963). Even if judges and juries refuse to convict under a vague law, it still "lends itself to selective enforcement against unpopular causes," *NAACP* v. *Button, supra,* 371 U.S. at 435; more specifically, it furnishes a convenient tool for "harsh and discriminatory enforcement by prosecuting officials against particular groups deemed to merit their displeasure," *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98 (1940). Convictions are not necessary to deter and suppress; usually mere prosecution or threat of prosecution will be sufficient. See *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965).

The fourth function of the vagueness doctrine springs from many of the same considerations as do the second and third functions. The vagueness doctrine bars government from overreaching constitutionally protected freedoms. That is why the vagueness doctrine is applied with greater strictness when a law abuts sensitive First Amendment rights. "Standards of permissible statutory vagueness are strict in the area of free expression. . . Because the First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity (when such freedoms may be affected by the regulation)." *NAACP* v. *Button,* 371 U.S. 415, 432-433 (1963); see *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), and au-

thorities cited. In a sense, this aspect of the vagueness doctrine is the equivalent of "over-breadth." Note, *supra*, 109 U. PA. L. REV. at 76, 80-81.

Especially as "illuminated" by the record in this case, and by its spotty history of enforcement, Section 610 fits well within the due process prohibition against vague statutes—all four aspects of that prohibition. In other words, on its face and as applied to the petitioners: (1) This statute provides inadequate notice to the petitioners. They do not know what conduct is necessary to conform to the requirement of law; and they are unable adequately to prepare their defense. (2) This statute lodges much too much discretion in the judge and jury. It leaves them free to decide, unconstrained by legally fixed standards, what is prohibited and what is not in each case. (3) This statute also leaves the prosecutor so unrestrained that he may enforce the law discriminatorily and selectively against only persons and groups with whom he is displeased. (4) This statute dangerously abuts and impinges upon federally protected freedoms and activities.

On its face, Section 610 is unconstitutionally vague in several particulars. Most notably, there is no definition of the word "expenditure." By "strain[ing] words" (*United States* v. *Rumely*, 345 U.S. 41, 47 (1952)), the courts have held that in three cases the political expenditure there involved was not prohibited by the Section despite the apparent flat prohibition therein. *United States* v. *C.I.O.*, 335 U.S. 106 (1948); *United States* v. *Painters Local Union No. 481*, 172 F.2d 854 (2d Cir. 1949); *United States* v. *Construction and General Laborers Union No. 264*, 101 F. Supp. 869 (W.D. Mo. 1951). However, none of these

decisions instructs us precisely as to the meaning of the term.

Countless questions arise. Compare *United States* v. *U.A.W.*, 352 U.S. 567, 592 (1957). May a union mail a mimeographed statement on political candidates to every member of the union? May a union use a radio program to express its views on candidates? Would it be different if almost all the listeners were members of the union? A majority? Half? Less than half? May a union pay President George Meany's plane fare to Missouri to make a political speech there? May it do the same for a potential or actual candidate in an election? These and many other questions remain unanswered.

Similarly the phrase "in connection with any federal election" has no commonly accepted meaning either in the statute, any legislative history, or the dictionary. The relation in time to an election, primary or convention, within which particular speech or action may be held "in connection with" the event is wholly uncertain. Would a union expenditure in 1971 directed toward a long range educational program designed to shape the outcome of the 1972 elections be proscribed? Would the preparation and distribution by the union of Congressional voting records demonstrating that certain legislators had more often voted for the union movement than certain others constitute an expenditure "in connection with" an election?

The vagueness and indefiniteness of the term "in connection with any federal election" finds an exaggerated counterpart in the term "expenditure." Together, when read literally, the two terms would interdict virtually every form of conduct which could be characterized as "in connection with" a federal election.

It is impossible to determine where the legislature intended for the prohibition to stop. Congress itself gave little indication of the evils at which it was aiming during the enactment in 1947 of what is now Section 610. (No clearer signals were provided when the predecessor provision was enacted in 1943.) The lack of discussion in the hearings and reports prior to the passage of the Labor-Management Relations Act results in there being little evidence as to the particular dangers which Congress may have felt made this outright prohibition necessary. See *United States* v. *C.I.O.*, 335 U.S. 106, 132, 134, 150, 151, 153 (1948) (Rutledge, Black, Douglas and Murphy, JJ. concurring). Hence, if taken literally, on its face Section 610 encroaches too much on First Amendment rights; if not taken literally, it is too vague.

Not only is Section 610 unconstitutional on its face, but it is inherently vague when applied to the facts of this case. Three judges dissented in the Court of Appeals over its application here, and the decision itself conflicts with two federal district court decisions decided prior to this case. *United States* v. *Teamsters Local 688*, 41 L.C. 23,380 (E.D. Mo. 1960); *United States* v. *Anchorage Cent. Labor Council*, 193 F. Supp. 504 (D. Alaska 1961). Petitioners took skilled legal advice as to the correct way in establishing the Fund. There was nothing more that petitioners could do without relinquishing their First Amendment rights. See generally *Brief for Petitioners* at pp. 84-94.

CONCLUSION

For the reason set forth in this brief, the Court should reverse the judgments of the courts below.

Respectfully submitted,

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December 16, 1971